

1919

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Ernst Freund, "Prolegomena to a Science of Legislation," 13 Illinois Law Review 264 (1919).

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PART V

LEGISLATION

PROLEGOMENA TO A SCIENCE OF LEGISLATION

BY ERNST FREUND¹

I

LEGISLATIVE VERSUS JUDICIAL FORMULATION OF PRINCIPLES

The objections to the recognition of a science of legislation as an independent branch of jurisprudence, a legislative in contrast to a judicial jurisprudence, reduce themselves to three heads: First, that the problems of legislation can be dealt with profitably only as relating to particular subjects, such as property, commercial law, crime, procedure, labor, municipal government, and so forth; that the situation is the same as that presented by the study of the common law, where we likewise deal with particular topics of more or less limited scope, and look askance at a separate abstract science of law in general, which has no place in the curricula of American law schools; second, that any science of legislation, whether divided into special topics or not, is nothing but an application of that science of law which is well established in doctrine and practice; that there are no principles governing legislation on contracts, wills, common carriers or labor, outside of the recognized principles of the law of contracts, wills, carriers, master and servant, and so forth; third, that in so far as established legal doctrine fails to furnish directions for the framing of legislation, legislation is an art and not a science, a matter of wise discretion in adapting means to ends, similar in this respect to the drawing of a will or contract.

These objections are weighty and valuable because they indicate limitations that must not be disregarded; but they state partial truths only, and ignore vital aspects of legislation.

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True, it would be quite unwise to claim for the province of a science of legislation problems, however important, that are peculiar to one subject and have no bearing upon any other; if such problems are touched upon, it is because they illustrate legislative methods in general. The material for a science of legislation is found in statutes on many particular subjects; knowledge becomes scientific when facts are studied with a view to discovering relevant relations applicable to cognate facts and helpful in dealing with them; so we treat statutory provisions in any particular field of legislation as types to serve in the construction of new legislation in some other field. Moreover, there are matters and points of constant recurrence in all legislation, relating to terminology, form, sanction, administration and operation, which may well be segregated, just as we segregate in criminal law or contracts a general part from the specific crimes or specific contracts, as we recognize the conflict of laws as a legitimate branch of the common law, and as we generalize problems of interpretation from other problems that arise in the judicial treatment of statute law.

True, also, that the first requirement for correct and intelligent legislation is a knowledge of the existing law. This may furnish all the data needed for the framing of a statute; thus the draftsman of a negotiable instruments law is well equipped if he is thoroughly familiar with the law of bills and notes. I shall have something more to say upon this point presently. But a knowledge of the law of real property or of the law of landlord and tenant is not enough for the preparation of a good housing statute. The more there is of conventional regulation in a statute, the less help is derived from the common law. Nor will the gap be filled by constitutional law, the knowledge of which will be to the legislator what the knowledge of the housing statute is to the architect.

And true, finally, that a good deal of the task of the legislator that is not controlled or directed by rules of the established law, is outside of jurisprudence altogether, either belonging to other sciences (economics, hygiene, architecture, and so forth), or being matter of sound discretion. As it takes a knowledge of the conditions of a particular case and the exercise of judgment on the basis of it, to draw a good will or contract, so it is with the drawing of a statute: there is an element that is irreducible to rule. But just as it is possible to lay down principles that will best meet typical conditions arising in connection with contracts or wills, so, and in a very much larger degree, is it possible to reduce in legislation

the province of discretion in favor of the province of norm and rule; for legislation should as far as possible deal with like cases in like manner. It is in the recognition and development of this truth that a science of legislation will find its justification.

It is well, also, to recognize at the outset that there are phases of legislation in which the problems offered are of the same character as those which confront the judge in dealing with a common law problem, the difference between the legislative and judicial attitude being the larger freedom enjoyed by the legislator, while the judge is bound by established law. This similarity is evidenced by the fact that a problem which is not fully dealt with by the legislator may become a problem of constructive interpretation for the courts. Thus a statute giving a cause of action to a parent of a child which is killed by the negligence of another, may say nothing as to contributory negligence of the parent; the task of completing the statute in that respect devolves on the court, and the judge proceeds to consider the problem as the legislator would or should have considered it.

What is done in such a case by the legislator is analogous to what is done in the development of common law rules by the process of judicial legislation with which every student of the history of English or American law is familiar. In other words, where legislation requires only the logical or rational working out of some basic proposition, it offers no specifically new methods of legal science. Much, perhaps most, of the legislation in the domain of private law is of that character. Nor is it a controlling difference in legislation of this character whether it is content to express common law principles with such minor modifications as recognized defects of established rules render desirable, or whether it undertakes a radical scheme of reform. Thus the married women's acts of the nineteenth century called for constructive legal thought of a high order, but not for thought for which the traditional learning of lawyers ought not to have afforded ample training. These acts indeed were in many respects based on doctrines which had already been developed through the judicial machinery of courts of equity. The controlling point in determining the character of legislation in this respect is whether or not it can accomplish its end by laying down propositions which are in the nature of principles. If it can, it does not call into play methods of legal thought or reasoning essentially different from those which courts have always employed in building up the law.

But while the methods of legal science employed in the legislative and the judicial formulation of principles are the same, the processes of statutory legislation involve two distinctive problems which in the process of judicial legislation do not exist or settle themselves.

The one is the problem of codification: how far shall the legislature go in the formulation of rules, and what had better be left to unexpressed reason and logic? We have to recognize this as a specific problem of legislation, though rather of the art than of the science of legislation. It is interesting in this respect to compare the French, German, and Swiss Civil Codes, or the chapters in the Field codes on sales or on partnership with the more recent codifications of the same subjects by the National Conference of Commissioners on Uniform State Laws;² but while many valuable suggestions may be drawn from such comparisons, they are hardly of the nature of principles definite enough to serve as instructions for draftsmen. It is obvious that nothing analogous to this problem of codification can arise in the judicial development of the law, in which the scope and intensity of rules is entirely controlled by the exigencies of the particular case before the court.

The other special problem of the legislative as distinguished from the judicial formulation of principles has to do with the manner in which a legislature, and particularly an American legislature, does its work. To take again the married women's acts as examples of legislation establishing principles rather than conventional regulations, in important respects these acts are fragmentary, and the present law of husband and wife less consistent than the common law. If a well rounded out and harmonious system of marital property rights was not constructed either in England or in America, this was due in part to an ingrained spirit of legal conservatism that prefers inconsistency to innovation, and partly to a lack of habit of systematic legislative action. Judge-made law has this great advantage over legislative law that the common law claims to be a logically coherent system; a rule of the common law that is not in keeping with all other rules thereby stands condemned as theoretically unsound, and consistency is, therefore, an acknowledged ruling factor in judicial reasoning. Piecemeal legislation, on the other hand, acknowledges no absolute obligation to be consistent in spirit and principle with other legislation; it is sufficient if its operation

2. See an instructive discussion by *Lauriz Vold* in *California Law Review*, V, 400, 471; VI, 37.

does not produce actual inconsistencies in resulting rights and liabilities. Contradictory provisions must be avoided, but not provisions that are merely anomalous or inharmonious; and still less is it an indispensable requirement that anomaly or even injustice do not result from the failure of statutory provisions to harmonize with rules of the common law that are left untouched, or with matters left to implication or remaining unregulated.

It requires a habit of systematic legislative thought to produce a statute, not merely harmonious in itself, but sufficiently comprehensive to prevent anomalies resulting from partial regulation, or—a still higher ideal—a statute harmonious with other statutes of independent operation. Such habit cannot be expected of the lawyer, however eminent or learned, who upon occasion takes charge of a particular piece of legislation, and who will be justified in feeling that he has only a limited mandate with a correspondingly limited responsibility. In my treatise on “Standards of American Legislation” I have urged due attention to correlation and standardization as essential principles of legislation. In a sense both are either matter of course or counsels of perfection, but they assume a very practical aspect if understood as principles necessarily involved in adequate and appropriate legislative organization, and almost unattainable without it. Both English and American legislation illustrate the inevitable shortcomings of measures prepared by distinguished lawyers or judges who are untrained in the practice of systematic legislation. In England, particularly, laws sponsored or inspired by high legal authorities have sometimes exhibited the grossest shortcomings; witness, e. g., the Prescription Act, the Infants’ Relief Act, the Illusory Appointment Act, which should be compared with the more comprehensive and systematic property statutes that were evidently prepared by draftsmen or by conveyancers. It is almost inconceivable that measures so open to criticism as those named should be produced by men professionally charged with the preparation of statutes; not that these men are abler lawyers, but that they will take a broader view of their task and by mere force of professional habit will tend to develop uniform and consistent standards. In no other way can such standards be secured, certainly not by the mere observation of precedents which lead to mechanical uniformity and often perpetuate defects and mistakes that might have been avoided by independent drafting.

To sum up these observations concerning legislation that accomplishes its purpose by the formulation of principles: the con-

structive jurisprudence which such legislation calls for is the constructive jurisprudence familiar to the common law; but this jurisprudence has to contend against the effects of haphazard legislative methods, and the problem of legislative science is thus turned into a problem of the machinery and organization of legislative action. The importance of this problem is evidenced by the attention it has received in recent years; when we consider improvements in drafting statutes we think first of all of the organization of legislative reference and drafting bureaus and the professionalizing of the draftsman's work, and this might perhaps be sufficient if the task of legislation were mainly of the type represented by the attempts to codify certain branches of the judge-made law. But we know that this constitutes but a minor part of the legislative output of a modern state.

II

THE SPECIFIC PROVINCE OF LEGISLATION

Leaving, then aside the formulation of principles in statutory form, a science of legislation as a distinctive branch of jurisprudence is concerned mainly with tasks for which the upbuilding of the common law furnishes no precedents or standards; with those aspects of statutes, in other words, that find no analogy in principles developed by judicial reasoning. *The special province of the science of legislation must be to carry the development of the law beyond what the processes of the unwritten law can possibly do for it.*

Judicial reasoning is by its very nature incapable of producing many rules which may be the only or the most adequate rules for dealing with a legal situation. The instrument of reasoning is logic, and its product a principle. If a principle were always sufficient for the practical adjustment of affairs, we might rest content with the processes of judge-made law, but a mere principle often fails to furnish the needed direction. Principle can determine that a female employe shall not be overworked, it cannot say, ten hours, not eleven. *Reasoning from principle does not produce measured quantities*; the period of the rule against perpetuities and the period of prescription, which seem anomalous exceptions, followed the analogy of previously established periods. The former was taken from the age of minority which was fixed by custom and not by reason, just as it was a custom—the custom of merchants—which

introduced the definite number of days of grace in the law of commercial paper. *Nor can principle produce form*; where the common law requires form for acts, they are due to custom, as the feoffment and livery of seisin, or the seal as a requisite of deed; neither writing nor attestation is anywhere in private law a judge-created requirement. And equity never solved the problem of priorities between successive purchasers or mortgagees, because the only effective means of publicity, the public record of instruments, was entirely incapable of being established or required by the exercise of judicial power.

Measured quantity, conventional form, administrative arrangements, and (it should be added), compromise and concession, constitute the exclusive province of statute law, and if these matters are amenable to principle, it must be principle quite different in kind from that represented by common law rules. The legislator has always the choice between a number of valid rules, and if this choice is controllable by considerations that may aspire to the dignity of principles, the principle is that of constant relations, the relation between methods and results, the law to which human action is subject irrespective of human authority, and largely dependent upon empirical, psychological, and sociological factors. Such a law the lawyer regards as being on the whole beyond his science, and as characteristic of the social and political sciences, and he will look with skepticism upon a proposed extension of jurisprudence in that direction.

In mapping out the province of legislative jurisprudence, it is indeed necessary, first of all, to mark it off from other well-established sciences, bearing in mind that any demarcation of this kind must be more or less conventional, a working arrangement rather than a logical differentiation.

Economics, sociology, and political science differ from other "humanities" by operating to a very great extent with and through legislation. The economics of labor or of transportation not only does not stop at the point of legislation, but in important respects finds in legislation alone its full fruition. Obviously the economics of labor and of railway legislation belongs to political economy and not to jurisprudence. In other fields the boundary line is less clearly drawn. Thus teachers of criminal law, professed jurists, have, in other countries more than in this, taken an active part in dealing with problems of crime, and jurisprudence is not as clearly separated from criminology as it is from political economy. Bar

associations concern themselves with questions of copyright, or of marriage and divorce; to what extent can they, by virtue of being composed of lawyers, on the ground of special studies, and apart from merely human or general experience gathered in the course of professional practice, claim to be experts in these subjects?

The only satisfactory division line will be that which assigns to jurisprudence the collection, systematization, and fructification of those data affecting the choice between various possible legislative provisions which have a specific relation to law as a social phenomenon, and for the handling and understanding of which training and tradition render the lawyer specially competent. Putting it in other words, the norms of jurisprudence are those that look to the adjustment of a new policy to adverse claims, that concern definition, form, proof, sanction, official acts, a due regard for existing rights, for orderly procedure, and for the co-ordination of the new and the old law, the limitations and effects of administrative and judicial processes operating through compulsion, and the attitude of the mind toward the abstract formulation of principles.

Apply this criterion to any branch of legislation: concede the general policy of labor laws to economics; jurisprudence will have to determine the province of statute law and of administrative regulation, the definition of offenses, the incidence of duties, the measure of penalties, the available and suitable methods of control, the correlation of rights and obligations, appropriate remedies, and the limits of enforceability. Upon the issue of strict versus liberal divorce policies, legal science may have no authoritative voice; but it must pass on definitions, defenses, extra-territorial aspects, the effect of divorce upon parental rights, marital property rights, name, testamentary provisions, and alimony. Upon the desirable extent of copyright, literary men or artists may have better information than lawyers, but the opinion of lawyers will be controlling when it is a question of formal conditions which accompany the creation of the right, and of the effect of the non-observance of those conditions upon the protection of the author.

Such demarcation lines cannot be absolutely fixed, and it may be that the progress of other sciences will narrow the bounds of jurisprudence. So long as the problem of justice has no data available other than administrative or judicial experiences, the material can best be handled by the jurist; so in the entire domain of value, damages and compensation. It is, however, quite possible that accurate knowledge will displace empirical judgment in the estima-

tion of some values, whether through actuarial methods or statistical investigations or otherwise. If so, the expert who calculates values will not be a lawyer; jurisprudence will take its data from the non-legal expert, and while the science of legislation will gain, it will not be through an advance in its specifically juristic aspects.

If Anglo-American jurisprudence has no place for problems that are specifically legislative, the neglect can be explained in a very simple manner. For obvious practical reasons, legal writing both in England and America has ever been entirely subservient to the needs of the legal profession. The business of the legal profession is litigation and not legislation. Consequently a question that cannot become the subject of discussion in a court of justice is, generally speaking, a question non-existent for legal writers. The exceptions are negligible. As has been pointed out, the problems that belong to specifically legislative jurisprudence are beyond judicial solution, and most of them are outside of the range of judicial thought. And this has been a sufficient reason for our legal science to pass them by without attention.

And it is not only that the call for professional legal thought in the service of legislation is relatively rare and intermittent, but when called for, it does not leave the same record of its operation as it does in litigation. The words of the statute are too often the only evidence of the legal thought that has gone into it. It is as though judicial reasoning had to be gathered from reports giving decrees only, without opinions, as was the earlier practice of the House of Lords. Moreover, the habit of not supporting decisions by reasons inevitably reacts upon the quality of the decisions. Compare the elaboration of any legal concept depending on facts, such as undue influence in wills, where the question of fact is passed upon by juries, with the same question where it is decided in reasoned judicial opinions, or the problem of administrative discretion exercised by a licensing board that simply states conclusions, with the same discretion exercised or controlled by a court that files decisions accompanied by reasons. Without a discursive statement of arguments in support of action, it is not only difficult to find the standards by which that action was guided, but there is considerable likelihood of the action not having been subjected to the searching test of principle. Had statutes always been accompanied by justifying statements, still more if these statements had had to dispose of contentious arguments presenting the two sides of a question, the study of principles of legislation would have an unquestioned

status. The rule in English and American legislation has been to state no reasons at all, and in the few cases where reasons have been published they have been of the most meager description. The scarcity of the material cannot fail to exercise a discouraging influence, and the student of legislative history will be under constant temptation to turn from the genesis of a statute on which he will frequently find no tangible or convincing evidence, to its judicial interpretation in the study of which he will find ample occasion to deal critically with theories authoritatively set forth. It is only upon the basis of paying material that a science can be expected to flourish.

Moreover, as already intimated, principles of legislation, where legislation goes beyond the formulation of "written reason," are different in kind from common law principles. Forecasting results, they are at most strong probabilities, depending for their strength upon the completeness of the survey of relevant factors and the correctness of the estimate of their operation. There are important problems with regard to which it is wisest to abstain from final conclusions, and to rest content with the recognition of relevant factors and with practical decisions. So with regard to the important question of form or informality of contracts. The arguments on either side are fully stated in the Commissioners' notes to the German Civil Code,³ and with these arguments the student of legislation should be familiar. But it does not follow that the conclusions of the commissioners should be accepted as determining the issue, and they are far from making such a claim. They decided in favor of informality for some of the most important contracts for which the Statute of Frauds fastened upon our law the principle of form. In fairness, this should be treated as an open legislative question. But assuming that the decision is made in favor of form, experience shows that there are rules that should govern the choice and detail of form and which cannot be ignored without causing inconvenience. In this more modest field, conclusions may be formed and stated, and an examination of statutes and of their judicial operation with this end in view is an undertaking as legitimate as any within the range of the political or social sciences. In a survey of the problems of legislative jurisprudence the difference between the understanding of relevant considerations and the possibility of reaching some determination with regard to their relative merits should be constantly borne in mind.

3. Volume I, pp. 179, 180.

III

FORMS, TERMS, AND REMEDIAL PROVISIONS

This matter of choice of forms may well illustrate the nature of legislative jurisprudence in one of its main departments.

Suppose the legislature decides in favor of requiring a formal act, what rules can be laid down for its guidance? What can we learn from the judicial history of the Statute of Frauds? The provision that the attestation of a will must be made by the witnesses *in the presence of the testator* has caused a great deal of litigation and judicial controversy. Why was it ever introduced? An early case says the object was to prevent the surreptitious substitution of another paper for the genuine will.⁴ The explanation—and no other has ever been suggested—is too absurd to deserve notice, except that it illustrates the kind of thought that is given to the genetic history of statutes. If there is no better explanation, we have a troublesome requirement serving no good purpose. Yet the provision has been copied into every American wills act, and has been amplified both in England and in some American states—a striking illustration of the aimlessness of statutory detail. Two principles are violated: first, that no formality should be required that serves no distinct and valuable object, particularly not where the formality is to be complied with by private persons; second, that under no circumstances, unless absolutely unavoidable (of course attestation is impossible unless the signature is made or acknowledged *in the presence of the witnesses*, otherwise it would be an untrue record, and this requirement creates no difficulty), should requirements that are matter of record be mingled with requirements that must rest on oral proof. If such a requirement as physical presence is contained in the formalities prescribed for a notarial will, it is a different matter, because the notarial certificate is in itself matter of record and is practically unimpeachable; this is proved by the practice under the German law, and by the former formalities of married women's acknowledgments of deeds, the notarial certificate being always accepted at face value.

If proof is demanded for the proposition that it is contrary to sound principle to mix matter of record and matter of oral proof (matter "in pais"), reference should be had to the cognate practice

4. "To prevent obtruding another will in place of the true one": *Shires v. Glascock*, 2 Salk. 688 (a decision rendered ten years after the enactment of the Statute of Frauds).

of permitting matter of record to be affected or impaired by facts resting on parol proof; this is much more difficult to avoid, because to exclude oral proof matter may amount to shutting out important equities except on condition of their being reduced to matter of record. The point is illustrated by the effect allowed to notice as against a record under the conveyancing acts, an unfortunate impairment of the integrity of record titles first introduced by courts of equity, then adopted by legislation and perpetuated to the present day, but the unsoundness of which is demonstrated by the more recent and more carefully considered course of legislation in England, and by its total abandonment in the new legislation for the registration of land titles.

As pointed out, the avoidance of needless formality should be insisted upon particularly where the act is one to be performed by private parties; if performed or supervised by officials, not only will any defect be apt to be covered by a correct (because stereotyped) form of certificate, but a defect is much less likely to happen because it may be expected that the official will act both with greater knowledge of the law, and with greater sense of responsibility.

This difference between official and private action is of controlling importance in the whole matter of statutory terminology, which constitutes one of the other main departments of legislative jurisprudence.

Much in the matter of adequacy and definiteness of terms is simply a question of good English and of a thorough understanding of the subject legislated on; but while good English is not beyond the range of possibility in the drafting of statutes, legislation cannot always wait for perfect knowledge, and therefore cannot always avoid terms involving either questions of degree or an appeal to judgment; moreover indefiniteness may be deliberately preferred to definiteness as a matter of legislative expediency or tactics. The availability of indefinite or elastic terms is a matter with regard to which a study of statutes and their operation will be found to yield valuable principles of legislation.

The decisive consideration is furnished by the conditions under which the law is to be applied and the kind of persons or bodies to whom it is addressed. A careful working out of relevant distinctions would throw much light upon the failure and success of legislation. We should understand how it is that penal statutes couched in vague and elastic terms are not only obnoxious to justice, but prove in practice unenforceable; we should learn on the other hand

that the most general language may be the most desirable in the grant of beneficial powers, while considerations of a special kind apply in using indefinite terms as a basis of civil liability and in matters affecting the security of titles. All these points can be illustrated and proved by the history of English and American legislation. The lessons to be drawn from that history have by no means all been learned, and their neglect accounts for some of the most conspicuous failures of legislative experiments.

The controlling difference between a penal statute and a grant of power is that in the former an error of judgment in the interpretation of the elastic term involves the risk of fine and imprisonment; in the latter merely the nullity of a declaratory act. For instance: "A factory shall be equipped with adequate exits"; in the absence of further definition this provision cannot easily be made the basis of a penalty; otherwise, where the law provides for appropriate administrative action defining adequate exits and imposes penalties only where the duty has thus been made definite; in the latter case a specification must precede a violation; the owner of the factory has the choice between obeying or treating the administrative act as invalid; the latter is a gambling chance which is properly at his risk; for the presumption is in favor of the validity of the specific administrative act, and if the law is well framed the order will be appealable.

The nullity of a simply declaratory or executory act—whether official or private—may disappoint expectations, but does not throw established *de facto* relations into confusion as is the case where executed acts are stricken by nullity. Practically every system of law tends strongly to attach to non-compliance with its rules the effect of nullity, partly because nullity operates as it were automatically, requiring no active initiative, but merely passive defense, partly because it appears as the simplest logical consequence of non-compliance. A legal act (i. e., an act done for the purpose, and intended by law for the purpose, of producing a legal effect) requires a prescribed form, or is not to be done except where prescribed conditions or qualifications exist, or is altogether prohibited to certain persons, at certain times, or for certain purposes; the act is done without that form, in the absence of the prescribed condition or qualification or in defiance of the prohibition; since for its effect it depends upon the law, is it not natural and logical to deny it the intended effect? Such reasoning seems plausible, if not irresistible.

But consider the situation where the act done in contravention

to legal requirements or prohibitions is not purely executory, but has altered actual relations of possession or status. To deny all legal effect to de facto conditions having the outward semblance of legality means confusion, insecurity, breach of faith, injustice. It is sufficient to think of a void marriage. On the one hand the need for law enforcement and the logic of the rule, on the other the claim that an established fact has to recognition—where is the solution?

The continental common law has a rule in favor of possessory conditions which has been incorporated into the French and German codes. The French code expresses it: "In the matter of movables possession counts as title." The common law of England has no similar general rule, although the doctrine of estoppel operates in some respects to the same effect. In the matter of marriages the canon law tempered the operation of its impediments by establishing a rule of voidability instead of nullity, in opposition to the nullifying effect of common law impediments, which the legislature extended to the most important of canon law impediments, that of relationship. Parliament was for a time even willing to visit the failure to obtain parental consent with nullity, but this was subsequently abandoned.

Both the common law and English legislation thus evince a tendency to apply the rule of nullity very rigorously. The judicial tendency is capable of explanation, for the rule of nullity comes naturally by logical deduction, and to counteract it requires concession, compromise and the creation of qualified, conditional, or limited rights—the very things judicial reasoning is incapable of producing, the very things which belong to the peculiar province of legislation.

Here indeed we encounter one of the most valuable functions of legislation, a function of stabilization, to reconcile as far as possible the claims of de facto relations with the claims of the original statutory policy which through inadvertence or otherwise has in some respects met with failure. The zeal which animates the legislature in pursuit of a policy leads it now and then to press the rule of nullity even beyond what the courts believe the logic of the law demands; compare, for instance, the statutory provisions concerning the invalidity of sales made by concerns engaged in unlawful trusts with the doctrine of the United States Supreme Court upholding the validity of such sales;⁵ and generally speaking, there seems to be no clear realization that here is a special function which legislation has to perform.

5. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

I should consider it as one of the important objects of a science of legislation to study and define the legitimate place of what may be designated as remedial and validating provisions. The material is found particularly in marriage legislation, in conveyancing statutes, and in the history of the law of testaments and wills. The validating function of legislation expresses itself in provisions which declare that non-compliance with specified requirements shall entail only a penalty, or shall warrant an application for preventive or other equitable or compensatory relief, but shall not cause collaterally available nullity; or in provisions that save certain aspects or parts of the defective act (issue of void marriage legitimate; attestation of will by interested witness to avoid only his interest and not the entire will); or in provisions that permit doubtful matter to be passed upon at an early stage by appropriate authority and to be concluded by its determination. Compare the canon law doctrine of devolution of a decedent's personal property with the common law doctrine of descent and devise, and the indisputable advantage for the facility of transfers resulting from the official authority of the executor or administrator; note the possibility of settling at once every question that may arise as to testamentary capacity and form and genuineness of will, by a proceeding for solemn probate, the gradual displacement of the common form of probate by this more conclusive proceeding, and the general extension of probate to wills of real estate which, under the common law practice, could be attacked for alleged defects of form or capacity during the entire period of the statute of limitations—and the soundness of the principle of legislation represented by the law of probate, as well as its expansive force, will be realized. The ecclesiastical courts were not, or only slightly, affected by the common law aversion to admitting official intervention in private affairs, an aversion also much less entertained in America than it was formerly in England (England is rapidly changing in this respect), and they thus succeeded in developing practices which experience proved to be superior to those of the common law, and which could be given full effect only by legislation.

In the law of conveyancing, legislation was called for to establish adequate publicity by an official recording system, while the validating effect of official action is only slowly and cautiously admitted in the so-called Torrens system of land title registration. Whether such effect can be given through administrative or only through judicial action is still controverted; and the general feel-

ing is probably that in private law administrative action is better suited to the application of precautionary checks (as in the matter of marriage licenses) than for conclusive determinations. Where it is not a question of adjudicating between conflicting private claims, but of determining matters fit for administrative disposition, statutory expedients for creating official powers of speedy and conclusive determination encounter less difficulty and are resorted to with increasing frequency. A very slight change of phraseology may turn a jurisdictional prerequisite into a matter submitted to jurisdiction (power to act in an emergency as against power to act when an emergency is believed to exist). The same difference is of importance in the framing of statutes for special judicial proceedings for the establishment or liquidation of important legal relations (adoption, sale of infants' estates, insolvency, drainage or irrigation). There is the double problem of securing compliance with substantive and procedural requirements, and of setting controversial questions at rest; a problem that cannot be solved without carefully elaborated contrivances in the way of required statements, notices, inquiries and findings, rights of appeal, and provisions in the nature of short statutes of limitations, but which can be solved for a considerable variety of statutory proceedings on principles that are similar or substantially alike.

Terms, forms, and remedial provisions present problems of constant recurrence in legislation, and which would, therefore, hold a prominent place in a system of legislative jurisprudence. The problems are of such nature that they can be effectually solved only by appropriate statutory provisions; no common law principle either of administrative law or of statutory construction can do more than furnish partial and inadequate, if any, remedies for doubts or inconveniences that are occasioned by the failure to make such provision, or that attend faulty legislation. The rule to be observed by the legislator is a rule of demonstrated fitness in adapting means to ends, a rule utilizing, by expedients of either language or procedure, the lessons that judicial and administrative experience has drawn from legal and legislative history, a law of legislation. Surely the formulation and application of such rules is a legitimate function of jurisprudence.

Terms, forms, and remedial provisions are matter of technical detail which arouse slight popular interest, and with regard to which the legislator may be expected to have an open mind. Barring the cases in which the desire to press home some strongly enter-

tained convictions concerning policies leads to an insistence upon drastic sanctions in the way of penalties, forfeitures, or nullities, the legislator will be inclined to accept what he has reason to believe the best thought on the subject, and the recommendations of draftsmen enjoying the confidence of the legislature will carry much weight. Not only, therefore, is this field one that lends itself especially to systematization, but a system recognized as wise may have a reasonable chance of making an impression upon actual legislation. Conversely, for the building up of this phase of legislative jurisprudence there is the same need as there is for the securing of high standards in codifying or reforming common law principles, the need of an appropriate organization of the business of legislation. The best principles of legislation cannot be expected to be constantly in the minds of those who are charged with the task of securing the adoption of a controverted policy. Not only that, but the draftsman's standards are always liable to be disturbed and impaired by the freedom of parliamentary amendment. This is one of the inevitable effects of popular law-making upon scientific standards of legislation. Parliamentary interference will be a disturbing factor in proportion as a measure engages public attention and interest. Standards of legislation will, therefore, gain in proportion as it will be possible to arrange and systematize legislation in such a manner as to segregate justice from policy. Such segregation may be accomplished in part by rules of procedure, in part by the separate codification of technical provisions that will serve for a number of statutes alike, after the manner of codes of procedure and of interpretation acts. The cause of legislative jurisprudence is bound up with what Sir Courtenay Ilbert has called the mechanics of law making.

IV

POLICY, DISCRETION, AND METHODS OF CONTROL

When we approach the domain of policy in legislation, the predication of any principles that can claim to be called scientific becomes increasingly difficult. We must be on our guard against mistaking personal preference for inherent superiority or a prevailing tendency for a permanent law. The temptation of claiming for jurisprudence too much is especially strong in view of our American doctrines of constitutional law. Important policies have been written into the bills of rights and have thus become binding

rules of legislation, whose interpretation and development is a legitimate function of judicial jurisprudence. This is, for example, true of the freedom of speech and press. This freedom, by virtue of being proclaimed in the constitutions, becomes a principle of American legislation, a principle in the sense in which the underlying policy of any statute becomes *pro hac vice* a principle, but it does not follow that freedom of the public expression of thought is a principle of legislation in the sense in which the liberty of private conduct is. The latter is an unescapable limitation upon legislative power to which it must conform by the conditions of its operation. It would be impossible, for the present at least, to make a similar claim for the freedom of speech and press.

Passing from specifically recognized policies to the general guaranties which we associate with due process and the Fourteenth Amendment, there may be an even greater inclination to identify these with scientific principles of legislation. But even here the identification must be rejected. For either the due process clause is used to support economic liberty, in which case it likewise stands simply for a fundamental policy, and one so much controverted and attacked that the historic law of legislation seems rather to run counter to the constitutional doctrines of American courts⁶ or due process furnishes the ground from which to attack unreasonable legislation. Now if the idea of reasonableness were given a sufficiently definite content, it might well stand for a science of legislation. But under the limitations of a purely negative judicial control this aspect of constitutional law reduces itself to the question: What is the worst that the legislature can do without violating the Fourteenth Amendment? It is obvious that on this basis the amount of constructive principle that constitutional law will furnish to legislative jurisprudence will be meager indeed.

It would on the other hand not do to expect of a science of legislation in every case an answer to the question: What is the best that can be done through legislation? And if that question could be answered, it would not follow that the legislature in every case would or should do it. There must not only be legislative discretion, but truth and reason are not necessarily its only guides.

Compare in this respect private action, administrative action, and legislative action. According to the theory of our law—different in this respect from the continental European law—adminis-

6. See my "Standards of American Legislation," chapter 1.

trative action is not only bound, but directed by legislation, and the relatively narrow province of administrative discretion indicates the necessary modification of that rule. Private action is bound, but not ordinarily directed, by law, so that there remains a wide domain of freedom which may be subject to other than legal rules (custom, morals, convention), or may be entirely unrestrained. Legislative action is (barring the limitations of a written constitution) legally free, but normally is more bound by rule than private action, for the reason that its object is the production of some rule of action, and a rule of action cannot make an adequate appeal for submission unless it is itself the embodiment of principle, at least so far as principle is capable of being applied. Freedom from principle in legislative action in other words is legitimate only if a principle is not available.

Let us examine the nature of legislative discretion more closely. Take, in the first place, the domain of technical private law in which the legislature competes with the courts for the purpose of codifying, supplementing or reforming the unwritten law. The legislature here professes to be guided by reason, and the discretion which it exercises is in the nature of a sovereign judgment. Legislation of this type is generally amenable to the test of principle, though by that test its shortcomings are often only too obvious. Examine in the light of what might be demanded in the way of a rational and co-ordinated system, such a typical portion of statutory private law as the regulation of marital property rights, and it will readily appear that if to these matters the same quality of systematic juristic thought were applied, as goes into judge-made law, the results would be very different. The principles to be applied are the principles of private law, differentiated according to different subjects, and only to a minor extent principles applicable to legislation as such. And the discretion exercised in not accepting the best principle is to a great extent simply the indisputable prerogative of any one charged with a task requiring skill and knowledge to produce an inferior instead of a superior piece of work.

To a great extent, but not altogether. It will sometimes happen that a statute appears in point of reason inferior to what it might be if constructed along purely rational lines, when we yet are bound to say that a representative legislature could hardly do otherwise than legislate in that particular way. To illustrate: When the married woman was made mistress of her own property, reason would seem to have required her to be placed under legal obligation

to make a contribution out of her property to the support of the family. The French and German law contain provisions to that effect. Even if their attention had been directed to the point, American legislatures would probably have been unwilling to enact similar legislation. The reason for the reluctance is probably not the feeling that the husband should bear the burden alone, but an unwillingness to give the husband a cause of action against his wife for contribution, or a temperamental tendency to let well enough alone, and not to introduce something new for which there is no insistent or articulate demand. It is not that discretion is here entirely devoid of principle, it is rather that the basis of principle is sentiment and not reason, and the student of legislation cannot afford to overlook that phase of it, although "jurisprudence" may be unable to systematize sentiment, elusive, undefinable and "unscientific" as it is. Perhaps we had better assign that side of legislation to political science. We may place in the same category the unwillingness to lower high abstract standards once they have been proclaimed in legislative form, a phenomenon to which I have adverted elsewhere.⁷ And for America at least, the persistent and in a sense deliberate, though not avowed or perhaps even fully realized, divergence between legislative and administrative standards, noticeable particularly in divorce legislation, is another factor of some importance that enters into the understanding of legislation.

We can speak here of elements influencing or even controlling legislative discretion, even if we do not care to dignify them by the name of laws or principles.

There are other phases of legislative discretion that elude even that much of rule. Upon such matters as the issue between wet and dry, strict and liberal divorce, permitting or forbidding marriage between different races, it is impossible to dogmatize. Legislative discretion here is that freedom of choice which represents ultimate and in a manner transcendental divergences of point of view and philosophy. At the opposite pole, but equally irreducible to calculation, stands the freedom of choice which means practical indifference, and which determines the alternative between several purely conventional possibilities, as where a period or an amount has to be fixed without any definite basis of relation or computation.

In a sense even such discretion is not arbitrary. The nature of law demands order and method, and therefore, although the

7. "Standards of American Legislation," p. 104.

legislature is free to choose, it does not, because it cannot without violating the superior law of its own being and action, vary its choice suddenly or capriciously from year to year, or from measure to measure, and is guided in its determination by custom, expectation, and the demand for relativity, uniformity, and stability. This is so natural and unquestioned that further comment is unnecessary. Illustrations are furnished by the uniformity of statutes of limitations, of the period of full age, of the amounts of fines, and so forth.

There is another phase of legislative discretion in which constructive juristic thought plays a much more important part. It is that discretion which stands for a policy of justice in matters in which justice must, for lack of accurate data, be more or less a matter of guesswork, where the thing demanded is fairness and equity between conflicting claims. This kind of discretion permeates the exercise of the police power. We recognize the interest of health as a higher interest than the interest of wealth, and the subordination of the latter therefore as legitimate. But such subordination is not always entirely practicable, and the extent to which one interest shall yield to the other presents the most delicate problem of conflicting considerations. This is equally true, if not more so, where one economic interest stands against another, particularly in the fixing of returns for services rendered or value given. *In the absence of objective and scientific criteria, some guaranty of fairness may be found in the choice of methods of control, upon the theory that certain methods by their very nature carry automatic checks, and that in any event there is a reasonably definite relation between forms of control and ends to be accomplished.* The study of these forms thus constitutes an important branch of legislative jurisprudence.

Above all it is necessary to distinguish the direct action of the legislature from its action through delegated powers. So long as there has been theoretical discussion of government there have been attempts to discover the effect of the forms upon the substance of legislation. There was a time when a representative popular assembly was believed to carry the guaranty of its fairness in its representative character and in its responsibility to the people; but while there is again some tendency to contrast in this respect representative action favorably with direct popular action, we have certainly ceased to believe in the adequacy of this guaranty. It is instructive to compare with this decline of faith in legislative methods the

continuing confidence in the constitution of the courts and the forms of judicial action, which are likely to be accepted as adequate guaranties of fairness where the data for formulating specific rules are inadequate. Without disparaging in the least the legislative sense of equity, any attempt to surround legislative action with the same safeguards that have been found indispensable in judicial organization and procedure, would not only fail in view of the constitution of a popular body, but that very constitution seems contrived for the purpose of making occasionally policy triumph over justice.

The inevitable shortcomings of legislative constitution and procedure from the point of view of legislative jurisprudence increase the value in that respect of such checks as may be found in the available methods of legislative control. These are after all limited to a relatively small number of types. There is on the one hand communal action (national, state, or local) which pursues the ends of government by using public resources for aid and service, and is bound by recognized laws of public finance and public administration, and into which enter such well understood branches of jurisprudence as the law of public office, of public property, of public contract, and public liability. There are, on the other hand, the forms of subjecting private property or private action to the law: public exactions (taxation, eminent domain, compulsory services), civil liability, and the control of the exercise of private rights. The problems of legislative jurisprudence are clearly revealed in the treatment of civil liability. We are accustomed to regard the common law as adequately determining the principles of civil liability. The phenomenon of accident as a practically inevitable result of the employment of great mechanical forces not only in industry but in every walk of life, opened the eyes of the community to the inadequacies of the common law, and we are gradually coming to recognize that statutory liability has become a means of shifting and averaging losses, and involves problems of limitation, precaution, supervision, insurance and distribution of relief, of which the common law knows nothing. We may not be prepared to say a given problem can be handled only in one way; but we know now, in the light of even very limited experience, what a given method of handling the problem involves in the way of necessary and available means and consequences. And in this matter we have only the very beginning of a legislative jurisprudence, associated with the advent of workmen's compensation legislation.

Experience in other forms of control is very much more ample.

Legislatures are, in a general way, familiar with the difference between prohibition, restraint, and requirement, between publicity, certification, license, exemption, monopoly, specification, and standardization. Each form by its very nature is subject to limitations which cannot be ignored with impunity, and may require the observance of appropriate conditions to insure its successful operation. Indistinctly this is realized, but the available data have not been collected or systematized. The police power deals with so many different subjects that study has been absorbed by the subject matter to the neglect of the methods of control; or, as in the United States, the study of the methods of control has been devoted to constitutional problems, as in my own treatise on the "Police Power." Thus in Europe the study of trade legislation is regarded as part of the economics of trade, while in America it also includes the study of the limitations of the legislative power over trade or of its distribution between state and nation. Would it not be worth while to study the province of positive requirements as distinguished from the province of restraints, and to examine on the basis of legislative and administrative experience, in what classes of cases positive requirements are appropriate and wise, and in what form and to what extent they can be safely applied? Much more would be learned in this way concerning the central problem of legislation, the adjustment of public control to private liberty, than by the study of a mass of judicial decisions upon the limits of the police power.

Methods of control cannot be considered without taking into account the legitimate function of delegated administrative action. The delegation of legislative powers to be exercised by administrative regulation has been discussed from the point of view of constitutional permissibility, but, owing to the failure to analyze with care the reasons that induce such delegation, with very unsatisfactory results. Where the legislature has, or can easily obtain, the data necessary for the intelligent framing of rules, there is both from the point of view of law and of government a strong presumption in favor of policies being fully set forth in statutes, and delegation should therefore be required to justify itself by strong countervailing considerations of the desirability of a flexible administrative control. But a different situation presents itself where the data for an intelligent framing of rules are not available or where it is desirable to confine interference with private liberty to purely corrective measures. Administrative action lends itself to qualification

by safeguards which are incapable of being applied to direct legislation and which may be instrumental or essential in working out a policy of justice. Delegation of legislative powers is then justified by inherent superiority of method. Through such delegated action alone is it possible to secure the semi-judicial handling of legislative discretion. This is specially true where legislative action aims at the fairest balance of conflicting economic claims. In the absence of known principles for the determination of values and fixing of rates, the next best substitute is the compromise that results from contentious argument. A reasoned decision requires the tentative laying down of something like a principle, and out of a multitude of decisions a permanent principle may ultimately grow.

English legislation entrusted the fixing of rates and rents to commissions having all the organization and powers of courts of justice, binding them substantially only to the rule of fairness. In America the practice has been to give to similar commissions a more administrative character. This would not be a disadvantage if it meant a greater latitude in dealing with precedents. In any event, administrative, like judicial, and in contrast to legislative, action implies more concentrated responsibility, a tendency to professional tradition and habit of action, and the possibility of applying procedural safeguards. Such legislation as the Interstate Commerce Act with its successive amendments illustrates modalities of delegation intended to affect the substance of control. Action upon complaint, action subject to approval, the requirement of hearings, the forms of permissible orders, indicate important differences in the exercise of rate supervising and rate making powers, and in the relation of private liberty to public control. The working out of justice in better ways than the legislature can bring about by its own direct action is the function and justification of delegation in these cases, and this is not disproved by the failure of the process up to the present time to produce satisfactory results. This failure is due in part at least to the insufficient attention that has been given to the modalities of delegation and their effects. If delegation is to make the process of legislation more scientific, the process of delegation must itself be subjected to critical study and analysis.

In compiling my collection of "Cases on Administrative Law" I attempted to include this matter;⁸ but the results were unsatisfactory owing to the scarcity of case material. Much more material could,

8. Chapter 1, "Executive, Quasi-Judicial and Quasi-Legislative Functions."

undoubtedly, be gathered at the present time from the decisions of public service and similar administrative commissions; but the analysis of cases can never be as illuminating as a study of administrative experience like that presented by the American Association for Labor Legislation in its pamphlet on Labor Law Administration in New York.⁹ A science of legislation will require substantiation through work of that kind.

In studying methods of control we should not overlook interest representation and the popular, neighborhood, or group referendum. Referendum action is essentially irresponsible and unamenable to principle. We recognize this even in the case of the jury which acts under the sanction of an oath and the requirement of unanimity. The possibilities of arbitrariness, where these safeguards are removed, explain the attitude of the Supreme Court in holding that the subjection of rights to uncontrolled majority dispositions may amount to deprivation of due process.¹⁰ Again it belongs to legislative jurisprudence to study the use of the referendum as a method of regulation, and its forms and checks, to distinguish political decisions by the people or by a local community at large from property or business decisions by small groups, to differentiate the overruling of interests by adverse interests from vote requirements so arranged as to bring about compromise or even to require substantial consent, and to study the problem of interest representation and its co-operation with official administrative organization. The legislative material is growing, and valuable experiments are being made in such widely different fields as city planning and minimum wage legislation—legislation which has had the advantage of careful thought and abundant discussion prior to its enactment.

V

JURISPRUDENCE AND POLITICAL SCIENCE

It may be objected that the problems of legislation thus stated are either problems of administrative law or problems of political science. I should answer that after many years of the study of administrative law I began to realize the full significance of this branch of the law only when I approached it from the point of

9. American Labor Legislation Review, Vol. VII, No. 2.

10. *Eubank v. Richmond*, 226 U. S. 137; note, however, the modified attitude of the Supreme Court in *Cusack Co. v. Chicago*, 242 U. S. 526.

view of constructive problems of legislation. And generally speaking I should be willing to concede or assert that not only the progress of legislation, but the progress of all law, is conditioned to a great extent upon the proper utilization and development of administrative processes, and that this can be demonstrated by a comparison of common law and canon law, of common law and equity, of common law and civil law, and of common law and modern legislation. I should further answer that the most practical aspect of political science is the contribution it can make to the solution of problems of legislation. It is impossible to differentiate very clearly what belongs to political science and what belongs to jurisprudence. Administrative organization may be more appropriately assigned to the former, administrative procedure to the latter. The majority problem has political, legal, and mathematical aspects; where the group referendum is used as a means of reaching fair decisions in property or business regulation, the problem is essentially one of the technique of justice.

Again, consider the problem of areas of legislation, largely determined as between state and nation by national constitutions, as between state and locality by long established custom. So far as the determination of areas is open to the legislator and indeed so far as it is a legitimate subject of theoretical inquiry for the student, though practically settled by written constitutions, the subject is political rather than legal in its nature; but the proper adjustment between the different provinces for the purpose of avoiding conflicts and securing the best co-ordination and co-operation, is a distinctly juristic problem, to be solved by adequate and appropriate formulation and procedure. Compare the abundance of discussion of the spheres of national and state legislation in the United States from the point of view of constitutional law, with the meagerness of the treatment of the same subject in its constructive aspect. Whether political science or jurisprudence, or both or partly one and partly the other, there is urgent need of studying the most effective manner of the local or areal apportionment and inter-adjustment of legislative powers.

Legislation being government in the form of law, the division of its study between the provinces of political science and jurisprudence is natural. The range and classification of legislative activities, the tendencies underlying the movement of legislation, the processes by which laws are initiated, prepared and carried into and through the legislature, the legislative organization for this

purpose, the organization and the instruments of propaganda, the differences between propaganda and the presentation and substantiation of the "case" for the statute, the motives avowed and unavowed that actuate promoters and legislators, the political constitution of the power that is required to enact the law, the formation of the majority and the checks upon it, the securing of adequate representation of the popular will, the organization and power of minorities, the due consideration of adverse factors, the recognition of the difference between the legislative and the administrative attitude of mind, the power of individual resistance, the just estimate of the unintended reactions both of the normal operation, and of the lawful and illegal evasion, of the law, and the safeguarding of the permanent and higher policies which we associate with the guaranties of bills and rights—all these are matters fully as important as the legal phases of legislation, and have long since been appropriated by the study and science of government. If in America lawyers and courts have undertaken to solve the problem of the adjustment of the higher policy of liberty to the more immediate demands of social control, under the name of constitutional law, they have trespassed upon a province not their own with very indifferent success. It is, however, true that for the study of some of the suggested problems the equipment of the lawyer is needed as much as, if not more than, that of the political scientist; it is simply a question of the preponderance of the legal or of the governmental aspect. On the continent of Europe this close connection between jurisprudence and political science has always been recognized both in university organization and in scientific literature; in England there has been an almost absolute divorce between the two, while in America the willingness and eagerness of political scientists to make jurisprudence an integral part of the study of government has encountered a somewhat cool reception on the part of professional jurists, who believe that legal studies can be successfully pursued without the aid of political science.

If this is true in so far as law is treated purely as a product of the judicial mind—the traditional attitude of the common law—it ceases to be true as soon as it is recognized that the purely judicial view of the law is hopelessly inadequate for any purpose but that of the legal practitioner whose mental vision is centered upon the court-room. *The processes of the court-room alone will not serve in the future (whatever may have been true in the past)*

to give us the needed advances in law; but so long as we may hope to retain the benefits of the traditional spirit of the administration of justice, a knowledge of the processes of the court-room will be essential to the proper understanding and handling of problems of legislation. Legislation from the point of view of law is social control adjusted to the conditions of ultimate judicial enforceability, with all that this implies, and legislation that tries to escape these conditions in reality attempts to establish government without law, government by flexible personal discretion, which in some quarters is honestly believed to constitute for some purposes the wisest legislative policy. The advocates of even such a policy must realize that if they want effectually to dispense with law, they cannot safely dispense with the knowledge drawn from judicial experience, and that the principles of legislative jurisprudence cannot be ignored in carrying out their policies.

The foregoing analysis, if written to any purpose, should have made it clear that, as legislation cannot do without jurisprudence, so jurisprudence cannot do without legislation.

The great difficulty in giving practical effect to this view by making legislative jurisprudence part of the recognized science of law and gaining for it admission to the curriculum of American law schools lies in the fact that the apparatus of legislative jurisprudence is not that to which law teachers are accustomed. While case-law can be used with great advantage in the study of legislation, the principles of legislation can never be learned from an exclusive or intensive study of cases. Judicial jurisprudence operates with reason, which stands for logic and equity, and, with authority; in legislative jurisprudence the place of authority is taken by the empirical teachings of the history of legislation. The danger of the empirical basis must be realized. An unmistakable trend of legislation may be accepted as evidencing a law of legislation; but is this law temporary or is it—from the point of view of reason—permanent, sound or unsound? The ultimate appeal must be to convictions not so firmly grounded as the conclusions of natural science; but so it is with all social sciences and with all judicial law, so far as it represents reason and not simply authority.

But there is this further difference between judicial and legislative jurisprudence: the process of judicial reasoning always leads to a result that at least claims to be entitled to intellectual assent, while the fruit of the study of legislation will for practical purposes often be an appeal to discretion on the ground of expediency.

The utmost that will be contended for in these cases will be the establishment of some tendency, or perhaps only the relevancy of some consideration. We shall have to be satisfied with a correct analysis of legislative phenomena, the operation of which eludes prediction as well as control. The task of legislative jurisprudence will then often narrow down to the reduction of statutory terms and provisions to more general categories available for other legislation.

And here the danger will be encountered of laying undue emphasis upon mere correctness of abstract generalization, a danger that lurks in dogmatic or systematic jurisprudence generally, and to which the science of law in Germany has to a certain extent succumbed. While the standards of German legislation in their technical and juristic aspects are entitled to the highest regard and deserve careful study on the part of every other nation, the inquiry into the nature of juristic concepts ("construction") which characterized the work of the most eminent German jurists during the entire nineteenth century has borne little practical fruit. What is valuable in the analysis of legislative concepts is not the establishment of ultimate logical categories, but the discovery of types that bear a definite relation to practical and vital problems of new legislation. Let it be clearly understood and constantly borne in mind that the improvement of the technique of lawmaking must be the object and the justification of a science of legislation.